

**2003 DRAFTING REQUEST**

**Bill**

Received: **04/10/2003**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Donald Friske (608) 266-7694**

By/Representing: **Anne Sappenfield**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - procedure**

Extra Copies: **MGD**

Submit via email: **YES**

Requester's email: **Rep.Friske@legis.state.wi.us**

Carbon copy (CC:) to: **anne.sappenfield@legis.state.wi.us**

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Exception to witness exclusion rule for investigating officer

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**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/1	rryan 06/12/2003	jdyer 06/13/2003	rschluet 06/13/2003	_____	mbarman 06/13/2003	mbarman 07/30/2003	
		jdyer 06/13/2003		_____			
				_____			

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FE Sent For: 4

*None  
Needed*

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&lt;END&gt;

Mike

4/9/03

Fenske via Anne Sassenfield

970.01

investigating officers have been  
excl. from internal app. under  
this

Fenske wants to reverse this  
apparently there is a ~~f~~ similar  
fed. provision that prohibits state  
from excluding investigating officers

## MEMORANDUM

from ANNE L. SAPPENFIELD  
Legislative Council Staff  
(608) 267-9485  
anne.sappenfield@legis.state.wi.us  
FAX: (608) 266-3830

Hi Robin!

Welcome back!

This is info. on the bill  
for Rep. Friske to amend

S. 470.01:

would me know if you  
have questions.

Anne

*USCS Fed Rules Evid R 615*

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\*\*\* CURRENT THROUGH CHANGES RECEIVED JANUARY, 2003 \*\*\*

FEDERAL RULES OF EVIDENCE  
ARTICLE VI. WITNESSES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

USCS Fed Rules Evid R 615 (2003)

- ♦ Review expert commentary from The National Institute for Trial Advocacy
- ♦ Review Court Orders which may amend this Rule.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

**HISTORY:**

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 1, 1987; Nov. 1, 1988; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(a), 102 Stat. 4405.)  
(Amended Dec. 1, 1998.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Amendments:

1988. Act Nov. 18, 1988 inserted "a" before "party which is not a natural person".

Other provisions:

Notes of Advisory Committee on Rules. The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to



remain in court despite the fact that he will be a witness. United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Powell v. United States, 208 F.2d 618 (6th Cir. 1953); Jones v. United States, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code § 777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

\* Notes of Committee on the Judiciary, Senate Report No. 93-1277. Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in--he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

Notes of Advisory Committee on 1987 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1998 amendments. The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).



State of Wisconsin  
2003 - 2004 LEGISLATURE

LRB-25147

RLR:.....

In 6/12/03

jld

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMR

Gen. Cat.

1 AN ACT...; relating to: exclusion of witnesses from legal proceedings. ✓

*Analysis by the Legislative Reference Bureau*

Under current law, upon the request of a party to a legal proceeding, a judge must issue an order excluding witnesses from the proceeding so that they cannot hear each other's testimony. However, a witness exclusion order does not apply to: a person who is a party to the proceeding; a representative of a company or other entity that is a party to the proceeding; a person whose presence is shown to be essential to the presentation of a party's cause; or, in criminal cases, the crime victim, unless the judge finds that exclusion of the victim is necessary for a fair trial. \*

This bill provides that a witness exclusion order does not apply in criminal cases to a law enforcement investigator designated by the prosecutor.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

2 SECTION 1. 906.15 (2) (bm) ✓ of the statutes is created to read:

3 906.15 (2) (bm) In criminal proceedings, one ✓ law enforcement investigator  
4 designated by the state.

5 SECTION 2. Initial applicability.

1           (1) This act first applies to criminal actions commenced on the effective date  
2           of this subsection. ✓

**3 (END)**

**Mentkowski, Annie**

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**From:** Gary, Tim  
**Sent:** Tuesday, July 01, 2003 11:09 AM  
**To:** LRB.Legal  
**Subject:** Draft review: LRB 03-2514/1 Topic: Exception to witness exclusion rule for investigating officer

It has been requested by <Gary, Tim> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 03-2514/1 Topic: Exception to witness exclusion rule for investigating officer